Supreme Court, U.S.
FILED

NO. 09-1001 FEB 2 - 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

H. Richard Austin,
Petitioner Pro Se

vs.

Douglas G. Peterson & Associates
Stephen W. Houghton,
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX NO. 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

H. RICHARD AUSTIN, C.A.No. 08-30128-MAP
Plaintiff

v.

DOUGLAS G. PETERSON &
ASSOCIATES, ET.AL.,
Defendants

MEMORANDUM AND ORDER RE:
REPORT AND RECOMMENDATION WITH
REGARD TO DEFENDANTS' MOTION TO DISMISS
(Dkt. Nos. 8 & 11)
November 18, 2008

PONSOR, D.J.

This is an action in which Plaintiff alleges improprieties in connection with the investigation of a fire that destroyed his home in Warren, Vermont on November 12, 1993. Defendants have filed a Motion to Dismiss, which was referred to Chief Magistrate Judge Kenneth P. Neiman for report and recommendation.

On October 20, 2008, Judge Neiman issued his Report and Recommendation, to the effect that Defendants' motion should be allowed on the ground that the litigation was not supported by Fed. R. Civ. P. 60, and is barred both by the doctrine of res judicata and by the statute of limitations. See Dkt. No. 11. On October 5, 2008, Plaintiff filed his objection to the Report and Recommendation. See Dkt. No. 12.

Upon de novo review, this court will adopt the Report and Recommendation and allow Defendant's Motion to Dismiss. As Judge Neiman persuasively found, this case has already been the subject of extensive litigation and rulings by the Court of Appeals. **Neither Rule 60, nor any other provision of the Federal Rules of Civil Procedure, permits the continuance of the litigation contemplated by Plaintiff here.** Moreover, this case is barred both by the doctrine of res judicata and by the statute of limitations. (Emphasis added).

Based upon this the court hereby ADOPTS the Report and Recommendation (Dkt. No. 11). Defendants' Motion to Dismiss (Dkt. No. 8) is hereby ALLOWED. The clerk is ordered to enter a judgment of dismissal. This case may now be closed It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U.S. District Judge

SUPPLEMENTAL APPENDIX NO. 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

H. RICHARD AUSTIN, C. A. No. 08-30128- MAP
Plaintiff

v.

DOUGLAS G. PETERSON &
ASSOCIATES, INC. and STEPHEN
W. HOUGHTON,
Defendants

REPORT AND RECOMMENDATION WITH REGARD TO DEFENDANTS' MOTION TO DISMISS
(Document No.8)

October 20, 2008

NEIMAN, C.M.J.

H. Richard Austin ("Plaintiff"), proceeding pro se, brings this action against Douglas G. Peterson & Associates, Inc., "an engineering firm that investigates the cause of catastrophic events across the country," and Stephen W. Houghton, "the firm's director of fire investigation services," (together "Defendants"), with regard to a fire that destroyed Plaintiff's home in Warren, Vermont, on November 12, 1993. (Complaint 4,12) Plaintiff alleges both fraud and conspiracy by Defendants, asserts that judicial error" committed by the United States District Court for the District of Vermont "has prevented [him] from obtaining Due Process regarding his meritorious cause of action," and

purports to bring this action under the authority of Fed. R. Civ. P. 60(b). (*Id.* 2)

Pursuant to Fed. R. Civ. P. 12(b)(6), *inter alia*, Defendants have moved to dismiss Plaintiff's complaint. Defendants' motion has been referred to this court for a report and recommendation See 28 U.S.C. 636(b)(1)(B). For the reasons that follow, the court will recommend that Defendants' motion be allowed.

I. STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss should be granted when a review of the complaint shows that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. See Fed. R. Civ. P. 12(b)(6); *Wagner v. Devine*, 122 F. 3d 53, 55 (1st Cir. 1997). The court must accept the allegations of the complaint as true, drawing all reasonable inferences in favor of the plaintiff. *See Albright v. Oliver*, 510 U.S. 266, 268 (1994); *Coyne v. City of Somerville*, 972 F.2d 440, 443 (1st Cir. 1992). Although the court is usually limited to the facts alleged in the complaint, it may also consider pleadings filed in a plaintiff's prior lawsuits. See *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001) (noting that such documents may be properly considered on a Rule 12(b)(6) motion.

II. BACKGROUND

This is at least the fourth lawsuit Plaintiff has filed arising out of the fire that destroyed his Vermont home in 1993. (Complaint 12, 37). In *Austin I*, Plaintiff sued his insurance company in the United States District Court of the District of

Missouri which transferred the case to the District of Vermont (*Id.* 38). After a five-day trial in July of 1997, the court entered judgment in favor of the insurance company, a judgment which the Second Circuit Court of Appeals thereafter affirmed, *Austin v. Hanover Ins,. Co.*, 165 F.3d 13 (2d Cir. 1998), cert. denied, 527 U.S. 1004 (1999). (See generally Mem. Of Law in Support of Def.' Motion to Dismiss ("Defs.' Brief"), Exhibits.)

In *Austin II*, Plaintiff filed two separate requests for relief from judgment, which the District of Vermont and then the Second Circuit dismissed, the latter calling one of the requests "frivolous for being barred by the doctrine of *res judicata*." (See Def.' Brief, Exhibit C.) As it did in *Austin I*, the Supreme Court denied *certiorari* with regard to both requests. See *Austin v. Hanover Ins. Co.* 531 U.S. 929 (2000); *Austin v. Hanover Ins. Co.*, 14 Fed. Appx. 109 (2d Cir.), *cert. denied*, 534 U.S. 954 (2001).

In *Austin III*, Plaintiff sued his insurer's attorneys and consultants, including Defendants here, for fraud and conspiracy in the District of Vermont. That complaint was dismissed by the court under the doctrines of *res judicata* and non-mutual collateral estoppel. *Austin v. Downs, Rachlin & Martin*, 2003 WL 23273466 (D.Vt. Nov. 3, 2003), a dismissal that was again affirmed by the Second Circuit and not reviewed by the Supreme Court. *See Austin v. Downs, Rachlin & Martin*, 114 Fed. Appx. 21 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

Now, in this fourth suit, Plaintiff alleges that Defendants engaged in fraud and conspiracy with regard to their fire investigation. (*Id.* 2). He also

asserts that "judicial error" committed by the District of Vermont has prevented him from obtaining due process regard his fraud-based claims. (*Id.*)

III. DISCUSSION

In the usual course, Rule 60(b), under which Plaintiff purports to proceed, provides an avenue for a party to seek relief from a final judgment, order or proceeding because there is "mistake, inadvertence, surprise or excusable neglect" (Rule 60(b)(1), "newly discovered evidence" (Rule 60(b)(2)), or "fraud...., misrepresentation, or misconduct by an opposing party" (Rule 60(b)(3)). It appears, however, that Plaintiff is relying on another part of the rule that allows a party to seek relief from judgment "for any other reason that justifies relief" (Rule 60(b)(6) as well as a part which states that the rule is not intended to "limit a court's power to.... entertain an independent action to relieve a party from a judgment, order or proceeding" (Rule 60(d)(1).

In the court's opinion, Plaintiff's reliance on Rule 60(b) to justify this so-called "independent action" is misplaced. As Defendants note, Plaintiff's action "is effectively an attempt [under Rule 60(b)] to undo a preexisting, final judgment of [another] court based upon matters pertaining solely to the conduct of prior litigation in that court." *Lundborg v. Phoenix Leasing, Inc.*, 91 F.3d 265, 273 (1st Cir. 1996). The usual course in such situations is for the court to dismiss the case. *See Treadaway v. Acad. Of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1422 (9th Cir. 1986) ("When a court entertains [a Rule 60(b)] independent action for relief from the final order of another court, it interferes with and

usurps the power of the rendering court.") See also *Lundborg*, 91 F.3d at 273 ("[w]hile there is no flat bar to conducting this autopsy" in a new tribunal, "the considerations of comity and orderly administration of justice" usually justify dismissal of the new suit) (applying Ninth Circuit law): *Ord v. United States*, 8 Fed. Appx. 852, 854 (9th Cir. 2001) (similar). Plaintiff offers no compelling argument to the contrary of this practice.

There are at least two other grounds for dismissal. First, as Defendants assert, the instant complaint is barred by *res judicata*, given that Plaintiff's causes of action appear to be the exact claims he asserted against Defendants and others in *Austin III*. *See generally In Re Sonus Networks, Inc., Shareholder Derivative Litig.*, 499 F.3d 47, 56-57 (1st Cir. 2007) (describing elements of *res judicata*). Indeed, even in *Austin III* the District of Vermont recognized that "Plaintiff cannot relitigate the same claim[s] merely by substituting new, different defendants, in this case the attorneys and experts affiliated with the party he unsuccessfully sued in *Austin I*." *Austin III*, 2003 WL 23273466, at *2 (citing *Nevada v. United States*, 463 U.S. 110, 143 (1983)).

Second, the court fails to see how Plaintiff's complaint, which consistently refers to events that occurred in the early to mid-1990s (see Complaint 12, 18-21), would survive any statute of limitations challenge, *See Saenger Org., Inc. v. Nationwide Ins. Licensing Assocs., Inc.*, 119 F.3d 55, 64 (1st Cir., 1997) (citing Massachusetts' three-year limitations period for fraud claims); *Kadar Corp. v. Milbury*, 549 F.2d 230, 234-35 (1st Cir. 1977) (same for conspiracy claims); *Bevins v. King*, 465 A.2d 282, 284 (Vt.

1983) (citing Vermont's six-year limitation period for fraud-type claims). Relatedly, since any Rule 60(b) attack "must be made within a reasonable time" (Rule 60(c)(1)), Plaintiff's action -- filed no less than three years after the conclusion of the action in Vermont, i.e. the Supreme Court's 2005 denial of *certiorari* in *Austin III* -- is unreasonably late under any measure. See *Cotto v. United States*, 993 F.2d 274, 280 (1st Cir. 1993) (motion filed sixteen months after entry of judgment not filed within a reasonable time)(citations omitted).

IV. CONCLUSION

For the reasons stated, the court recommends that Defendant's motion to dismiss be ALLOWED.

DATED: October 20, 2008

/s/ Kenneth P. Neiman
KENNETH P. NEIMAN
Chief Magistrate Judge

SUPPLEMENTAL APPENDIX NO. 3

United States Court of Appeals
For the First Circuit

No. 09-1099

H. RICHARD AUSTIN
Plaintiff- Appellant

v.

DOUGLAS G. PETERSON & ASSOCIATES;
STEPHEN W. HOUGHTON
Defendants - Appellees

Before
Lynch, Chief Judge
Torruella, Boudin, Stahl,
Lipez and Howard, Circuit Judges

ORDER OF COURT

Entered: July 22, 2009

All outstanding motions by Jonathan Lee Riches to intervene and appear as amicus are denied.

By the Court:

/s/ Richard Cushing Donovan, Clerk

SUPPLEMENTAL APPENDIX NO.4

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

H. RICHARD AUSTIN, 08-CV-30128 (MAP)
Plaintiff Pro Se,
St. Louis, Missouri (Jury trial requested)

v.

DOUGLAS G. PETERSON &
ASSOCIATES,
Greenfield, Massachusetts
STEPHEN W. HOUGHTON,
Greenfield, Massachusetts
Defendants

AMENDED COMPLAINT -
INDEPENDENT ACTION IN EQUITY

1. The Complaint (07/07/08) is amended pursuant to FRCP 15(a)(1)(A).

1a. Federal jurisdiction is based on diversity of citizenship and amount in controversy, which exceeds the minimum (28 USC 1332). (See no. 40-41, damages).

2. **This "independent action" is brought pursuant to FRCP 60(d)(1).** It concerns a dispute that in its current state constitutes a "grave miscarriage of justice." All of the required elements of a viable independent action are present: I) a judgment (unsupported dismissal) which ought not in equity and good conscience be enforced; II) fraud

compounded by judicial error (both legal and factual), which has prevented plaintiff from obtaining Due Process regarding his meritorious cause of action; III) the absence of any adequate remedy at law so equity must at this point be relied on; and IV) an absence of any fault on plaintiff's part. *National Surety Co. v. State Bank*, 120 F. 593 8th Cir. 1903); *Marshall v. Holmes*, 141 U.S. 870 (1891).

3. This action is for **fraud perpetrated by professional experts** under the guise of.....